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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. BYRON KEITH STREET, Defendant and Appellant.	B287424 (Los Angeles County Super. Ct. No. SA086128)

APPEAL from a judgment of the Superior Court of Los Angeles County, H. Jay Ford III, Judge. Affirmed.

Donna L. Harris, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

BACKGROUND

In 2015, Byron Keith Street was convicted of first degree murder and several other crimes.

The trial court sentenced Street to an indeterminate term on the murder count (count 8) as follows: 25 years to life for first degree murder, 25 years to life imposed consecutively for a gun enhancement, and a sentence of life without the possibility of parole for the special circumstance of murder committed while Street was engaged in the commission of burglary. The court also sentenced Street to a total determinate term of seven years four months, to run concurrently to the indeterminate term, as follows: the four-year middle term for first degree burglary, and a total of three years four months for the other determinate terms, i.e., eight months (one-third the middle term of 24 months) each for false personation, counterfeit seal, and three counts of felony vandalism.

We affirmed the conviction on appeal but concluded the sentence was unauthorized in several respects. (*People v. Street* (June 21, 2017, B267285) [nonpub. opn.].)

First, we concluded that the non-capital sentence for first degree murder with special circumstances is life without the possibility of parole (LWOP), not LWOP plus 25 years to life. Second, we concluded Street could not be sentenced for both burglary and special circumstances murder where the burglary constituted the special circumstance. We ordered that the burglary sentence be stayed, the stay to become permanent on completion of the sentence for murder. Finally, although the jury found three gun enhancement allegations to be true—under subdivisions (b), (c) and (d) of Penal Code section 12022.53—the trial court imposed sentence only under subdivision (d)—a

consecutive 25 years to life—but no sentence under subdivision (b) or (c).[1] We concluded that sentence "*must be imposed for all section 12022.53 enhancements that have been found true, and then all but the longest sentence should be stayed*." (Italics added.) Accordingly, we ordered that the trial court impose and stay execution of sentence on the gun enhancements under section 12022.53, subdivisions (b) and (c).

On remand, the trial court held two resentencing hearings. At the first hearing, on December 11, 2017, with Street absent, the trial court told the attorneys, "I have prepared a written outline of what I believe the Court of appeal has mandated regarding the resentencing and am prepared to place that on the record now." The court then resentenced Street as we had directed. As pertinent here, the court ordered the previously imposed sentence of 25 years to life stricken, re-imposed a sentence of LWOP for the special circumstances murder, and re-imposed a consecutive term of 25 years to life for the gun enhancement under subdivision (d) of section 12022.53.

After the first resentencing hearing the trial court received a letter from Street indicating he wished to present at his resentencing. The trial court again set the matter for resentencing and ordered that Street be transported to court.

At the second resentencing hearing, on January 26, 2018, the trial court first recalled the sentence imposed in December 2017. (§ 1170, subd. (d).) It then stated, "My intention is to indicate how the prior sentence is modified and imposed *based on the Court of Appeal's remand order*." (Italics added.)

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[1] Undesignated statutory references will be to the Penal Code.

The trial court then imposed exactly the same sentence as it had in December 2017 but inadvertently neglected at first to impose a murder sentence, stating, "As to count 8, the court orders the sentence of 25 years to life on the charge of murder, in violation of Penal Code section 187 stricken from the judgment."

The prosecutor asked, "Are you going to sentence on count 8? I don't think you've done that."

The trial court replied, "Count 8 was the original sentence. [¶] As to count 8, the defendant—*I'm only modifying the sentence where indicated by the Court of Appeal*. The original sentence of count 8, which was for life without the possibility of parole, the court imposes that sentence without change. [¶] . . . [¶] Also, there was an enhancement. . . . [¶] That remains unchanged as well. [¶] Yeah, as to the count 8, the court orders imposed without a change from the original sentence the enhancement under 12022.53(D) for 25 years to life." (Italics added.)

Defense counsel asked, "Your Honor, was it clear whether the enhancement under (D) was concurrent or consecutive?"

The trial court replied, "It is required to be consecutive."

Street appeals from this sentence.

DISCUSSION

Street contends the case should be remanded for resentencing in light of recently enacted Senate Bill No. 620, which the trial court either did not know about or disregarded in an effort to adhere to our directions on remand.

As a preliminary matter, we acknowledge that Street forfeited his contention by failing to raise Senate Bill No. 620 at the second resentencing hearing, but will reach the merits of the issue anyway. (*People v. Williams* (1998) 17 Cal.4th 148, 161-162, fn. 6 ["An appellate court is generally not prohibited from

reaching a question that has not been preserved for review by a party. [Citations.] Indeed, it has the authority to do so"].)

The jury found that Street personally and intentionally used and discharged a firearm, causing great bodily injury and death. Lacking at the time authority to strike or dismiss a gun enhancement under section 12022.53 (see, e.g., *People v. Kim* (2011) 193 Cal.App.4th 1355, 1362-1363), the trial court imposed a 25-years-to-life gun enhancement pursuant to subdivision (d) of section 12022.53.

Before Street had exhausted his opportunities to challenge the trial court's judgment in reviewing courts, the Legislature amended section 12022.53 to provide that the "court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section." (§ 12022.53, subd. (h); Stats. 2017, ch. 682.) The amendment went into effect on January 1, 2018. (See Cal. Const., art. IV, § 8, subd. (c).)

Generally, amendments to the Penal Code do not apply retroactively. (§ 3.) However, our Supreme Court has recognized an exception for an amendment that reduces the punishment for a specific crime. (See *In re Estrada* (1965) 63 Cal.2d 740, 745 (*Estrada*); accord, *People v. Brown* (2012) 54 Cal.4th 314, 323-324.) The *Estrada* court explained that when the Legislature has reduced a crime's punishment, it has "expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act." (*Estrada,* at p. 745.) The Court inferred that "the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply." (*Ibid.*) To

"hold otherwise would be to conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology." (*Ibid.*)

The Supreme Court has extended the *Estrada* holding to amendments that give the trial court discretion to impose a lesser sentence even if it does not necessarily reduce a defendant's punishment. (*People v. Francis* (1969) 71 Cal.2d 66, 75-76; see *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 308.)

Although the trial court here had no discretion to strike a gun enhancement either at the time of sentencing or the December 2017 resentencing hearing, that discretion had vested by the time of the second resentencing hearing. "In the absence of evidence to the contrary, we presume that the court 'knows and applies the correct statutory and case law.' " (*People v. Thomas* (2011) 52 Cal.4th 336, 361.) That the court simply chose not to strike a gun enhancement pursuant its newly-vested discretion is no ground for reversal.

Street argues that the record affirmatively shows the trial court was unaware it had the discretion to strike the gun enhancement. This is so, he argues, because "the resentencing judge repeatedly stated that its intention was solely to implement the modifications of the sentence as directed by the decision of this Court," and its statement that the gun enhancement was "required to be consecutive" shows it was unaware of the amendment to section 12022.53. The argument is without merit.

A defendant is entitled to sentencing decisions "made in the exercise of the 'informed discretion' of the sentencing court." (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.) A court that is unaware of the scope of its discretionary powers cannot exercise that informed discretion. In such circumstances, the appropriate

remedy is to remand for resentencing unless the record affirmatively indicates the trial court would have made the same decisions even had it been aware of its discretion. (*Ibid.*)

However, trial courts are generally well forewarned about important amendments to criminal statutes, especially sentencing statutes. This would be especially true of Senate Bill No. 620, which was much discussed in the courts after its passage and caused several cases to be remanded for resentencing even before it took effect. To believe the court here was unaware of the amendment stretches credulity beyond any measure we would accept on a silent record.

The real issue is not whether the trial court knew about the amendment but whether it felt bound by our prior opinion to disregard it. But that notion too defies belief. Although we stated in our opinion, delivered in June 2017, that sentence "must be imposed for all section 12022.53 enhancements that have been found true," no trial judge of our experience would take that as a dictate to defy a subsequent change in the law, and the court's comments here certainly give no hint to that effect.

The trial court's statements at the first sentencing hearing that it had prepared an outline according to what we had "mandated," and at the second that it would impose sentence "based on [our] remand order," do not change our conclusion. The court was not asked to strike the enhancement. Had it been asked and *then* stated it could not do so because of our prior order Street's argument might have more traction. But without such a request the statements constitute nothing more than stage setting.

Nor did the court's statement that the gun enhancement was "required to be consecutive" show it was unaware of its

discretion to strike the enhancement in the first instance. That statement came in response to defense counsel's question about whether sentence on the enhancement would be concurrent or consecutive. It was simply as an answer to the question, no more.

Because the record does not clearly indicate that the trial court misunderstood its discretion, Street's request for a remand for resentencing must be denied.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, Acting P. J.

We concur:

BENDIX, J.

CURREY, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.